



CERCLA Liability and Local Government Acquisitions

Helena Healy and Cecilia De Robertis
U.S. Environmental Protection Agency
Office of Site Remediation Enforcement





Working Together

- EPA wants to help local governments address CERCLA liability concerns.
- EPA recognizes that local governments play an important role in getting sites back into productive use.
- EPA writes policy and guidance to clarify liability concerns for state and local governments.



Liability Under CERCLA

- Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. §§ 9601 to 9675) (CERCLA) (a.k.a. Superfund)
- CERCLA is a strict liability statute
- Liability under CERCLA is joint and several
- Under CERCLA § 107, a current owner of contaminated property can be liable for cleanup costs



Exclusion and Defenses to CERCLA Liability for Local Governments

CERCLA protects local governments from liability when:

- It obtains property involuntarily (§ 101(20)(D))
- The contamination has been caused by a third party (§ 107(b)(3) and § 101(35)(A)(ii))
- It qualifies as a bona fide prospective purchaser (BFPP) (§ 107(r))
- It is conducting a cleanup of a brownfield pursuant to a state cleanup program (§ 128(b))
- It takes action in response to an emergency from a facility it does not own (§ 107(d)(2))



Enforcement is Different from Grant Determinations

- Brownfield grants require that a grant recipient is not liable under CERCLA
- Applicants have an opportunity to address liability and explain whether any exemptions, affirmative defenses, or liability protections apply
- Grant determinations are not indicators of an enforcement action



Involuntary Acquisition

CERCLA § 101(20)(D)

- Statutory language: “The term ‘owner or operator’ does not include a unit of state or local government which acquired ownership or control of property involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. . . .”
- EPA Guidance: Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action (1995)
- Limitations:
 - state or local governments that have caused or contributed to the release or threatened release
 - Eminent domain (inconsistent case law)
- Determined on a case-by-case basis



Third Party Defense

CERCLA § 107(b)(3) and §101(35)(A)(ii)

CERCLA § 107(b)(3) requires that one establish by the preponderance of the evidence that:

- Contamination was caused solely by a third party
- Act was not “in connection with a contractual relationship”
- Party exercised due care
- Party took precautions against foreseeable acts

CERCLA § 101(35)(A)(ii) excludes from “contractual relationship” governments who acquire the property through involuntary acquisition of eminent domain.

EPA Guidance: Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser Definition, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (“Common Elements”) (2003)



Bona Fide Prospective Purchaser (BFPP) CERCLA § 107(r)

- Before the 2002 Brownfield Amendments to CERCLA, prospective purchasers of contaminated property could not avoid the liability associated with being the current owner if they purchased with knowledge of contamination.
- Self Implementing
- EPA Guidance: Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser Definition, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (“Common Elements”) (2003)



Bona Fide Prospective Purchaser Requirements

- BFPP status is available for sites acquired after January 11, 2002
- BFPPs must meet the following threshold criteria:
 - Perform “all appropriate inquiries” (AAI) 180 days prior to acquisition
 - Demonstrate “no affiliation” with a liable party
- BFPPs must also satisfy the following ongoing obligations:
 - Comply with land use restrictions and not impede the effectiveness of institutional controls
 - Take “reasonable steps” to prevent release of hazardous substances
 - Provide cooperation, assistance and access
 - Comply with information requests and administrative subpoenas
 - Provide legally required notices



Enforcement Bar CERCLA § 128(b)

- EPA may not take an enforcement action against a person cleaning up a brownfield site pursuant to a State cleanup program (CERCLA § 128(b)).
- A few exceptions:
 - Imminent and substantial endangerment and additional response action may be necessary
 - State requests EPA assistance
 - New information indicates cleanup may not be protective
 - Migration across state lines or onto federal property

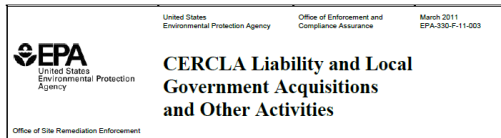


Memorandum of Agreement with Virginia

- In 2002 EPA and Virginia DEQ entered into an agreement recognizing assessment and cleanup work under the oversight of the Virginia Voluntary Remediation program.
- Available at:
www.epa.gov/brownfields/state_tribal/moas_mous/vamoa.pdf



CERCLA Liability and Local Government Acquisitions and Other Activities Fact Sheet



Local governments can play an important role in facilitating the cleanup and redevelopment of properties contaminated by hazardous substances. In particular, by acquiring contaminated properties, local governments have an opportunity to evaluate and assess public safety needs and promote redevelopment projects that will protect and improve the health, environment, and economic well-being of their communities.

One impediment to local government acquisition of contaminated property is concern about potential liability for the cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, also known as "Superfund" or "CERCLA," 42 U.S.C. §§ 9601-9675.

This fact sheet addresses CERCLA liability issues for local governments and summarizes key statutory provisions and requirements.¹ It is intended to assist local governments by identifying CERCLA liability issues and protections that may be applicable to local governments as they consider involvement at contaminated properties.

The U.S. Environmental Protection Agency (EPA) recommends that local governments refer to the statutory language of CERCLA, the regulations at 40 C.F.R. Part 300 (known as the "National Contingency Plan"), and relevant EPA guidance (referenced at the end of this document) for more detail. EPA's Regional offices² also may be able to provide information and assistance to local governments considering acquisition of contaminated properties. EPA also encourages local governments to consult with their state environmental protection agency and legal counsel prior to taking any action to acquire, cleanup, or redevelop contaminated property.

What is CERCLA?

CERCLA outlines EPA's authority for cleaning up properties contaminated with hazardous substances regardless of whether the properties are in use or abandoned. Additionally, CERCLA establishes a strict liability system for determining who can be held liable for the costs of cleaning up contaminated properties. CERCLA also provides EPA with robust enforcement

¹ A local government also may have obligations and/or be potentially liable under other environmental statutes such as the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (RCRA) or state laws.

² For contact information, see <http://www.epa.gov/aboutepa/postal.html#regional>.

- Summarizes key CERCLA statutory provisions and requirements.
- Recognizes that local governments may become involved with contaminated properties in a number of ways.
- Available at:
www.epa.gov/compliance/cleanup/revitalization/local-acquis.html



Revitalizing Contaminated Sites: Addressing Liability Concerns

- Commonly known as the “Revitalization Handbook.”
- Expanded in 2011 to address local government concerns.
- Available at:
[www.epa.gov/compliance/
resources/publications/
cleanup/brownfields/handbook/](http://www.epa.gov/compliance/resources/publications/cleanup/brownfields/handbook/)



Revitalizing Contaminated Sites: Addressing Liability Concerns



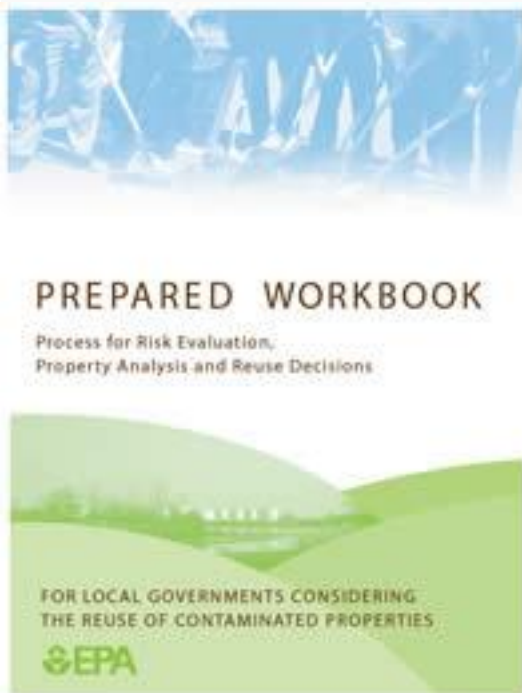
The Revitalization Handbook

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Workbook for Local Governments Considering the Reuse of Contaminated Properties (“Muni Manual”)



- Provides risk management framework, including:
 - Establishing project goals
 - Conducting due diligence and assessing project risk
 - Potential management risk and liability risks under federal environmental statutes
- Available at:
[www.epa.gov/region1/brownfields/
prepared/index.html](http://www.epa.gov/region1/brownfields/prepared/index.html)



Questions?

Helena Healy

Healy.helena@epa.gov

(202) 564-5124

Cecilia De Robertis

Derobertis.cecilia@epa.gov

(202) 564-5132

www.epa.gov/compliance/cleanup/revitalization/